IN THE

Supreme Court of the United States.

Ex parte

GEORGE L. WHITMAN,
Petitioner.

BRIEF FOR NATIONAL BANK OF OXFORD IN OPPOSITION TO APPLICATION OF THE PETITIONER FOR WRIT OF CERTIORARI.

The National Bank of Oxford, being the plaintiff in the suit in the Circuit Court, the defendant in error in the Circuit Court of Appeals, and the successful party in the Circuit Court of Appeals, respectfully presents, through its counsel, the following reasons why the prayer of the petition should be denied:

POINT I.

The amount involved is small.

The amount of the judgment in this case is $4,205.48. The sum involved has not been commensurate with the pertinacity of the petitioner in his defense of this litigation. It is so small as to require very especial

reasons for the intervention of this Honorable Court in the litigation and for the consequent continuance of the suit during some further period of time.

POINT II.

There has been no conflict of decisions among the Circuit Courts or the Circuit Courts of Appeals upon the questions of law brought up by this controversy.

The decision in the present case follows the decision of the Circuit Court of Appeals for the Seventh Circuit, construing the same constitutional and legislative provisions of Kansas.

Rhodes vs. U. S. National Bank, 66 Fed. Rep., 512.

It also follows the decision of the Circuit Court in the First Circuit, upon the same point.

McVickar vs. Jones, 70 Fed. Rep., 754.

It also follows the decision of the Circuit Court in the Ninth Circuit upon the same point.

Bank of North America vs. Rindge, 57 Fed. Rep., 279.

It is also in accord with the decisions of other Federal Courts upon analogous constitutional and legislative provisions of other States than Kansas.

Cuykendall vs. Miles, 10 Fed. Rep., 342.

Auer vs. Lombard, 72 Fed. Rep., 209, decided by the Circuit Court of Appeals for the First Circuit.

It is also in accordance with all of the decisions of the Supreme Court in regard to the double liability of a stockholder in a national bank.

There is no authority whatever in any Federal Court to the contrary.

POINT III.

The decisions of the State Courts are not to the contrary.

The decision in this case is exactly the same as the decision in *Guerney vs. Moore*, 131 Mo., 650, decided by the Supreme Court of the State of Missouri. To precisely the same effect is the recent case of *Ferguson vs. Sherman*, 47 Pac. Rep., 1023, decided by the Supreme Court of the State of California.

As pointed out by Judge SHIPMAN, the highest Courts of the States of Massachusetts and New York have not yet come to a final conclusion. In the cases of *Marshall vs. Sherman*, 148 N. Y., 9, and *Bank of North America vs. Rindge*, 154 Mass., 203, the State Courts expressly held at the outset of their opinions that they were not permitted upon the pleadings to consider the construction placed by the Kansas Courts upon the Kansas Constitution and legislative statutes. The State Court of Massachusetts, in the later decision of *Hancock Bank vs. Ellis*, 166 Mass., 414, distinctly shows its readiness to follow the views of the Federal Courts, provided the pleader sets forth not only the Kansas Constitution and Statutes, but the construction placed upon them by the Kansas Courts. That all Federal Courts take judicial notice of the constitution, statutes and decisions of the courts of all of the States has been held from the beginning of the Supreme Court.

The only State Court which has definitely refused to consider this an extra-territorial liability, is that of Illinois *(Tuttle vs. National Bank of the Republic)*

In this case, the first opinion of the Supreme Court was in accordance with all of the other authorities. It will be found in the National Corporation Reporter of Chicago, 20th of December, 1894 (Vol. 9, p. 316). But this opinion was in some way rescinded, and the Court eventually held, by a vote of four to three, that the liability could only be enforced in the State of Kansas (161 Ill., 497).

The great trend of authority therefore in the State courts is the same as the unbroken line of decisions in the Federal courts. Were it otherwise, inasmuch as the State court of Illinois has not only deliberately overturned its own prior opinion, but has gone directly contrary to the case of *Rhodes vs. U. S. National Bank* decided by the United States Circuit Court of Appeals for that circuit in which the State of Illinois lies, it is unlikely that the views of that State court upon this point will be affected by a decision of the Supreme Court of the United States. These cases are brought in the Federal court simply by reason of diversity of citizenship and not because any Federal question is involved. No writ of error lies to review any of the decisions of the State courts where the cases have been brought originally in the State courts. No State court would be bound to follow the rulings of the United States Supreme Court upon this question.

POINT IV.

Upon the Principles Controlling.

Judge SHIPMAN'S opinion is sufficient to dispense with further discussion in support of the correctness of the decision of the United States Circuit Court of Appeals. We shall submit herewith, in case the Court

desires to read any part of the same, copies of our brief in the United States Circuit Court of Appeals. It may be pertinent to call to the attention of the Court one or two suggestions therein contained.

(a) It is to be noted that the Kansas constitutional provision and legislative provisions, taken together, make the statute practically identical with the Federal statute relative to the liability of stockholders of national banks.

The Constitution of Kansas says broadly :

> "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such *other* means as shall be provided by law."

No "*other* means" have been provided by law. But, for the enforcement of the double liability of stockholders thus declared in the Constitution itself, there have been special remedies provided by the Legislature, the statute, however, expressly leaving open to the creditor of a corporation the privilege of proceeding by ordinary action instead of availing himself of these special remedies.

If the Court reads the Constitutional provision in connection with the last clause of Section 32 of the legislative provision, the nature of this liability will be apparent.

The Constitution says :

> "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder."

The Legislature says:

> "The plaintiff in the execution" [*i. e.*, the judgment creditor of the corporation] "may proceed by action to charge the stockholders with the amount of his judgment" ["to an extent equal in amount to the amount of stock by him or her owned"].

Whether or not this Court deems the Constitutional provision to be self-executing, whether or not it was necessary for the Legislature to enact a statute in order to enforce the right declared in the Constitution—at any rate it was not necessary for the Legislature in such a statute to reiterate the declaration of the right. Our learned opponents, having contended to their satisfaction that the clause in the Constitution was not self-executing, have always proceeded to treat the subject as if the Constitution had never existed. Finding no express declaration of this Constitutional right in the Statute, they have argued that *nowhere* was there any declaration of the individual liability of stockholders. Therefore they have said that there was nothing to the statute but a remedy. It needs only a glance at the statutes for the Court to realize that the Legislature enacted them mindful of the Constitutional provision. The exceptions in the statutes relating to railway, religious and charitable corporations are the same as those in the Constiution. Obviously the Legislature thought it unnecessary to say again what had already been said in the most powerful statute of the State.

(b) It does not require, therefore, any decisions of Kansas Courts to make parallel the provisions of the Kansas Constitution and statute to the provisions of the Federal statute relating to stockholders in national banks. Concerning the liability under the last mentioned statute, it has been said in the Supreme Court.

"Under that act the individual liability of the stockholders is an essential element in the contract by which the stockholders became members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of by the corporation. There is nothing in the statute to indicate that the obligation arising upon these undertakings and promises should not have the same force and effect, and be as binding in all respects, as any other contracts of the individual stockholder."

Richmond vs. Irons, 121 U. S., 27, 55.

(c) We call particularly to the attention of the Court the cases of *Flash vs. Conn*, 109 U. S., 371, and *Huntington vs. Attrill*, 146 U. S., 657. Each of these cases leads along different lines to the same result, namely, that the liability should be enforced outside of the State of Kansas. *Flash vs. Conn* rests its decision upon the ground that the decisions of the Court of that State should control whose Legislature has enacted the statute. If that State Court says that the liability is contractual it should be enforced outside of the State; if it says that the liability is penal it should not be enforced outside of the State. *Huntington vs. Attrill* goes much further than this, holding that all so-called statutory liabilities should be enforced outside of the limits of the State enacting them, unless they are penalties of a criminal or quasi-criminal nature. To evade the force of this last decision, the petitioner must contend not only that the Kansas provisions create a mere penal liability; but, more than that, he must contend that there really was no right at all secured to the creditor by these provisions; that they only amount to some special remedy not founded upon

a right, if such a remedy could exist. It is manifest from the language of the statutes that such was not the intent of the Kansas Legislature ; and, had the Legislature had any such intent, it would have been impossible for it to give it effect, as such intent would have been contrary to the provisions of the Kansas Constitution.

(d) From any of the above points of view, the Circuit Court of the United States for the Southern District of New York had precisely the same jurisdiction over the subject of this action as any Federal or State Court sitting within the territorial limits of the State of Kansas.

POINT V.

The application should be denied.

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Of Counsel.